

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re Application of)	
)	
KAXT, LLC)	
<i>Proposed Assignor</i>)	
and)	File No. BALDTA-20130211ACT
OTA BROADCASTING (SFO), LLC)	
<i>Proposed Assignee</i>)	
)	
For Assignment of the License of)	
Television Broadcast Station KAXT-CD)	
San Francisco-San Jose, California)	

TO: Marlene H. Dortch, Secretary

ATTN: Chief, Media Bureau

**SUPPLEMENT TO OPPOSITION TO
PETITION TO DISMISS, DENY, OR, IN THE
ALTERNATIVE, HOLD APPLICATION IN ABEYANCE**

KAXT, LLC, licensee of Class A television station KAXT-CD, San Francisco-San Jose, California (“Licensee”) and proposed assignor in the above referenced application for consent to assignment of the KAXT-CD license to OTA Broadcasting (SFO), LLC (“OTA”), hereby supplements Licensee’s pending Opposition to the March 18, 2013, Petition to Dismiss, Deny, or, in the Alternative, Hold Application in Abeyance (Petition”) filed by Ravi Kapur, Nalini Kapur and Rishi Kapur (“Petitioners”).

The sole allegation in the Petition was that Licensee had not properly agreed to the contract for sale of KAXT-CD to OTA and that Licensee's Manager was not authorized to sign the pending assignment application. Petitioners' prayer for relief was to ask the Commission to hold approval of the application in abeyance pending a decision by an Arbitrator in California on questions concerning ownership and management of Licensee. The Arbitrator has now ruled as follows:


It is declared and confirmed that the Asset Purchase Agreement between OAT, LLC and KAXT, LLC was duly authorized and validly executed by KAXT, LLC and may be consummated in accordance with its terms.

Accordingly, the attached full text of the Arbitrator's Phase 1 Award hereby supplements and is incorporated in Licensee's earlier-filed Opposition in this proceeding. This should now resolve all outstanding issues raised in the Petition.

Respectfully submitted,

KAXT, LLC

By:


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Its Attorney

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September 25, 2013

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AMERICAN ARBITRATION ASSOCIATION

Warren Trumbly, Linda Trumbly, Jeremy Noonan, Robyn Noonan, Alicia Torres and Herbert Alvarado, et al.,

Claimants and Counter Respondents,

v.

Nalini Kapur, Ravi Kapur and Rishi Kapur,

Respondents and Counter Claimants

No. 74-140-00012-13 SM

PHASE 1 AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the named Parties dated May 15, 2009, having been duly sworn, and having duly heard the proofs and allegations of the Parties, AWARD as follows:

I. BACKGROUND

A. The Parties

1. Claimants are Warren Trumbly, Linda Trumbly, Jeremy Noonan, Robyn Noonan, Alicia Torres and Herbert Alvarado. All are members of KAXT, LLC.

Warren Trumbly has been involved in the television industry for over 40 years. He started as an engineer, has worked in many TV stations, built stations, acquired five low-

1 powered, Class A stations in Northern California, was President of the Community Broadcasters
2 Association, has been a consultant for many TV broadcasters across the country, regularly gets
3 calls from others in the industry, and helps solve their TV problems.

4 Linda Trumbly, Trumbly's wife for 45 years, owned a station called Broadland
5 Properties, Inc. Robyn Noonan -- who did not testify -- is the Trumbly's daughter and Jeremy
6 Noonan, a businessman, is her husband. Alicia Torres was Broadland's station manager from
7 2001 to 2008 or 2009. Herbert Alvarado worked since 2005 at Broadland, now at KAXT, in
8 production, editing, monitoring, and office procedures.

9 2. Respondents are Ravi Kapur, Nalini Kapur and Rishi Kapur. All are
10 members of KAXT.

11 Ravi Kapur is a journalist by trade, got involved in broadcasting in high school, studied
12 communications at Syracuse, received a fellowship from the National Association of
13 Broadcasters for leadership, worked as an anchor, reporter and producer for a number of
14 television stations across the country and, counting internships, has worked in TV for 20 years.
15 He was also part of two Emmy Award-winning teams in the Bay Area, and recently was awarded
16 an Emmy for a KAXT program called Bounce Report.

17 Nalini Kapur is a successful realtor, and owns, rents and refurbishes properties. She is
18 Ravi Kapur's mother and Rishi Kapur -- who did not testify -- is his brother.

19 3. KAXT, LLC is a "Nominal Counter-Respondent" in this case.

20 B. The Birth of KAXT, LLC

21 When 16, Ravi Kapur ("Kapur" means Ravi Kapur) interned for a year or so at one of
22 Warren Trumbly's stations ("Trumbly" means Warren Trumbly), and kept in touch with
23 Trumbly from time to time as the years went on. Around April 2008, Kapur reconnected with
24 both Trumblys at the National Association of Broadcasters in Las Vegas. Trumbly asked if
25 Kapur knew people that might want to invest in the KAXT station.¹ Kapur did, and for some
26 time both Kapur and Trumbly tried to "spur" investment in KAXT.

27 Kapur advised Trumbly that his "ideal is to be a full 50/50 partner with you *over time*"

28 ¹ Broadland then owned KAXT, the broadcaster. Later, KAXT, LLC owned KAXT.

1 (emphasis added). Both believed the target investment needed was \$300,000. That investment
2 money, if obtained, was, among other things, to change the station's broadcasting from analog to
3 digital. Kapur said if he landed an investor at the targeted \$300,000, he would want to be
4 accorded 5% of the company and suggested that the investor would be accorded 20% of it. Ex. 1.

5 But as it turned out, neither Kapur nor Trumbly was able to spur an investor. As Kapur
6 testified, it was late 2008, and "nobody was loaning money to small business in particular."
7 Trumbly had lost a lot of money in real estate and had none of his own to spend. Kapur then
8 brought his mother and brother onboard, and the Kapurs agreed to invest the \$300,000 target
9 themselves, as a group. Trumbly thought KAXT's license and its assets equaled \$1M, and so
10 proposed that the Kapurs be accorded 30% of KAXT. Accordingly, a Memorandum of
11 Understanding was drafted and signed by the Trumblys and the Kapurs. It provided that the
12 Kapurs would receive 30% of KAXT (Ex. 2). Kapur explained that was just a "placeholder,"
13 Trumbly and Kapur negotiated, and Trumbly agreed to accord the Kapurs 42% of KAXT. As
14 the Kapurs' closing brief put it, "Warren Trumbly had failed in attracting other investors to
15 KAXT [so had Kapur] and was therefore dependent upon Respondents' money." That fact
16 apparently accounted for the Kapurs' increased percentage.

17 C. Good Times

18 Kapur said he "knew from an operations standpoint, I thought he [Trumbly] would do a
19 tremendous job," and "I thought from the business side. . . I thought I could really make a big
20 boost" for KAXT. That proved true. The \$300,000 (actually \$270,225) went to work and so did
21 both men. They worked well and hard together from 2009 to mid-2012. Trumbly built the
22 station, 12 digital channels were opened, cash flow increased, KAXT, LLC was launched and, as
23 Kapur put it, by 2011-12, together "we had built the most diverse station in the United States," a
24 significant accomplishment.

25 D. Disagreement

26 The "Spectrum Auction" was a whisper in 2009, but became more lively in 2011. By
27 February, 2012, Congress authorized the Auction. The Auction meant to be "an incentive for
28 television broadcasters to tender the spectrum that they had licensed." Previously, the "Treasury

1 kept the proceeds,” but this time the FCC was “willing to split the proceeds with the licensee.”
2 The Auction may never occur, but it is scheduled for 2014; if it does occur, it would more likely
3 happen in 2015. Meanwhile, other entities offered to buy many station licenses. The buyer’s
4 risk, among others, is that the Auction won’t happen or won’t for many years. The buyer’s
5 upside is that, if it happens, the half of the license the FCC will pay back to the buyer may
6 substantially exceed the price the buyer paid for the license, the station’s most valuable asset.
7 See Day 1, Tr. 30-34, *et. seq.* (Expert William Fanning).

8 Two entities, LocusPoint Network, LLC and OTA Broadcasting, LLC, made various
9 dollar proposals to buy KAXT’s license and assets as time went on: \$3M in 2011, \$5M in the
10 spring of 2012, \$7M and then \$7.25M from OTA in August, 2012. The majority of KAXT’s
11 voters approved that offer but let its letter of intent expire. In October, OTA increased the
12 proposal to \$8.25M. But Kapur did not want to sell KAXT, apparently because he wanted to
13 work there for a long time, perhaps a career. He had expressed that wish before the KAXT, LLC
14 Operating Agreement (“Op. Ag”) was signed. Nalini Kapur and Kapur’s brother Rishi
15 apparently objected to the sale because of Kapur’s desire to maintain his job there. (See, e.g.,
16 Ex. 48, p. 1: “the Kapurs have consistently stated that they do not want to sell.”) No contract
17 provisions, however, promised to effect that desire or mentioned it.²

18 Prior to the October 26, 2012 Members Meeting, Nalini Kapur advised Trumbly that the
19 Kapurs wanted to present an offer at the Meeting. The Kapurs did not do so. Rather, according
20 to Trumbly, at the meeting the Kapurs’ counsel, whom the other Members had not seen before,
21 accused “me [Trumbly] and everybody [except the Kapurs] of tax fraud, lying and cheating,” and
22 advised that “the Kapurs were actually majority members and they were taking over the
23 company.” This account was perhaps overstated, but the substance of it was undisputed. The
24 Kapurs moved to replace President Trumbly, and voted to do so, claiming they held the majority
25 of the Membership. Claimants, the majority of the Members of Record, did not vote for the
26 Kapurs. That was the end of the Parties’ good times.

27
28 ² The Kapurs made clear in Phase 2 that they also objected to the sales price, an issue that will be addressed in the Phase 2 Award.

1 Thereafter, the majority of the Members of record (the Claimants) voted to approve the
2 \$8.25M offer in December, but did not sign any Broadland-KAXT Asset Purchase Agreement
3 (APA) and the bidding went on. LocusPoint proposed \$10M in January, 2010, and Claimants’
4 counsel asked whether the Kapurs would agree to sell at that price (\$10M was at least 10 times
5 more than KAXT’s value in 2009). The Kapurs’ counsel advised that the Kapurs would not
6 agree without seeing the proposed contract terms, and the buyer would not provide a proposed
7 agreement until KAXT approved the amount, so the Kapurs did not approve or disapprove the
8 proposal. Thereafter, OTA offered \$10.1M, Claimants approved the offer, and the OTA APA
9 was signed at the end of January.

10 Claimant’s counsel did not ask the Kapurs whether they would approve the \$10.1M offer,
11 but at hearing Kapur made clear he would not have approved it at \$10M or \$10.1M.

12 II. THE PARTIES’ CONTENTIONS AND RESOLUTION OF THEM

13 The Arbitrator suggested and the Parties agreed to bifurcate the evidentiary hearing into
14 two Phases. In Phase 1, Claimants seek a declaration “confirming the Asset Purchase Agreement
15 between OTA and KAXT, LLC was duly authorized and validly executed by KAXT, and may be
16 consummated in accordance with its terms.” Respondents contend that Claimants are not
17 entitled to that declaration because, under the Parties’ Operating Agreement’s terms, (again,
18 called Op. Ag.) the Kapurs together hold the majority interests of the KAXT Members, and
19 Claimants (and employee, but not Party, Sam Sutton) together do not. Therefore, they argue,
20 Claimants were not “duly authorized” and consequently could not validly execute the OTA APA.
21 Respondents also argue, among other things, that Claimants defrauded them.

22 There is no doubt that the Kapurs and Claimants (including Sutton) agreed that the
23 Kapurs were to hold 42% of those interests and Claimants (again including Sutton) held 58%.
24 Also, it is clear that the Op. Ag. and the KAXT, LLC APA on their face accord with that 42%-
25 58% agreement. However, the Kapurs contend that a list of reasons proves their point:
26 Claimants never held the majority interests to begin with, Respondents were defrauded, other
27 wrongs were committed, and accordingly Claimants are not entitled to the declaration they seek.
28 Respondents’ list of Phase 1 issues and the resolution of both them and the Parties’ Phase 1

1 claims follow.

2 A. The Contention That the OTA Transaction Was Not Validly
3 Approved, Regardless of Respondents' Counterclaims

4 1. Notice of the OTA Sale

5 The Kapurs note that the Operating Agreement, § 5.2, requires that “decisions may be
6 reached through one or more informal consultations . . . provided that all Members are
7 consulted.” The Kapurs argue that Respondents were not consulted because, although
8 Claimants’ Counsel advised the Members that a \$10M offer had been made, he did not tell him
9 who the proposer and its terms were. The Kapurs’ counsel also points out that Claimants’
10 counsel did not advise the Kapurs’ counsel that the \$10.1M proposal was made, so the Kapurs
11 weren’t consulted about it either. These arguments have no substance. The Kapurs knew who
12 the two proposers were, had been consulted for months, had made clear they did not want to sell,
13 were informed of the \$10M offer and essentially disregarded it. In any event, Kapur confirmed
14 at hearing that he wouldn’t have accepted \$10.1M. Also, if he and his family wished it to be
15 accepted, he and they would have lost nothing, because the majority of record accepted it. This
16 contention fails.

17 2. The Kapurs argue that under the Operating Agreement, § 7.1., KAXT
18 could not be sold without the Members’ universal agreement. However, Op. Ag. § 7.1 provides
19 that “Any action that may or that must be taken by the Member shall be by a Majority of
20 Members” except for three items, none of which are germane here. Also § 5.1 provides that “all
21 major decisions concerning the management of the Company’s business shall be made by the
22 vote of a Majority of Members.” Respondents point out that Op. Ag. § 9.1(c) provides that it
23 takes “the written agreement of all Members to dissolve the Company.” That does not help
24 Respondent, because §9.1(d) does not require unanimity to sell “substantially all of the Company
25 assets.”

26 The Kapurs argue that not requiring unanimity deprives them of the “benefit of the
27 bargain.” But there was no general unanimity bargain in the Op. Ag., none in the APA, and none
28 in parol. To the contrary, it would be most unlikely had the Parties fashioned such a bargain,

1 since it would have permitted a 1% Member to prohibit the other 99% from selling the Company
2 at any time at any price.³ This contention fails.

3 3. Claimants removed Nalini Kapur from her manager position in November,
4 2012 (the other manager was Trumbly). Respondents argue that Claimants could not do so
5 absent a unanimous vote. However, Op. Ag., ARTICLE V: MANAGEMENT, § 5.1, sentence 1
6 provides that the Company shall be managed by two Members. Sentence 3 provides that “unless
7 otherwise provided in this Agreement, all major decisions concerning the management of the
8 Company’s business shall be made by the vote of a majority of Members . . .” There is no
9 germane other universal provision in the Op. Ag. Nor is this unusual or out of line. Cal. Corp.
10 Code § 17152(b) provides that an LLC Manager may be removed by a majority vote absent a
11 provision to the contrary, and there is none.

12 This contention fails.

13 4. Respondents argue that the process by which Claimants determined to sell
14 KAXT was inadequate and so was the \$10.1M sale price. But whether that were so or not, the
15 issue here is whether Claimants and Sutton were “duly authorized” to validly execute the OTA
16 APA. Respondents claim that they now hold the majority interests of the KAXT Members, so
17 they, not Claimants and Sutton, are the “duly authorized.” However, Respondents do not hold
18 the majority interests of KAXT and never have. Claimants and Sutton do. (See II (B), (C), (D),
19 E and (F), below). Therefore Claimants and Sutton were duly authorized to sell KAXT,
20 effectuate that sale and accordingly execute OTA’s APA. (Op. Ag. 5.1, 7.1 and II B(1), above).

21 Respondents also assert a “Derivative Breach of Duty Against Warren Trumbly and
22 Jeremy Noonan” (Counterclaim 10). This claim alleges, among other things, that Trumbly and
23 Noonan “failed to do any valuation study . . . or meaningful review of the adequacy of the
24 \$10.1M offer by OTA,” and “breached their duty of care to KAXT with their negligent and
25 reckless conduct during their sales negotiations.” The Kapurs advise that if the Arbitrator
26 affirms the “validity of the [OTA] APA [sale], the Kapurs will be damaged by no less than

27 _____
28 ³ Respondents reply that they would have agreed to the 1% veto because they did not want to sell. However,
contracts are not unilateral.

1 \$2,107,000.” The Arbitrator does affirm the validity of that sale. (See paragraph above).
2 Accordingly, that damage claim (Counterclaim 10) remains in issue and will be resolved in the
3 Phase 2 Award.

4 B. The Contention That Brad Donaldson Was Never a KAXT
5 Member (Counterclaim 1).

6 1. Respondents advise that Donaldson did not hold his Membership Interest
7 in a Trust for himself, so he was not a KAXT member. To be sure, Donaldson did not hold his
8 Membership Interest in Trust for himself. Rather, he held his interest for the benefit of the
9 Trumblys. The Trumblys were without dispute Members. A “Member who is a natural person
10 may transfer all of any portion of his or her Membership Interest to any revocable trust created
11 for the benefit of the Member . . .” Op. Ag. at 8.2. Accordingly, they were entitled to create that
12 Trust.

13 The Trumblys had to retain their voting interests to maintain their Membership.
14 Respondents claim Donaldson possessed his voting interest at all times. That is incorrect. The
15 voting interest was possessed by the Trumblys from at least January 2010 forward. (See Tr.,
16 Day 2, pp. 13-14).⁴ Respondents argue further that “the most compelling evidence that no trust
17 existed is the fact that no trust documents were ever created.” No doubt it is unusual to create a
18 trust that is not papered, but it is not illegal. Respondents advise that an oral trust must be
19 “proved by clear and convincing evidence, and that the oral declaration of the settlor, standing
20 alone, is insufficient to establish that such a trust was created.” But here the settlor was not
21 alone; Donaldson testified he was the Trustee, and proved it by word and deed when he returned
22 the interest he held as Trustee to the Trustor (the Trumblys), a fact reinforced by the voting
23 charts at least from January 2010 forward.⁵ And in the end, even if Donaldson did not hold his
24 interest in Trust for the Trumblys, that supposed fact would not prove that Donaldson himself
25 had never been a KAXT Member anyway.

26 ⁴ Nor does the evidence show that Donaldson voted in 2009. Indeed, he was never at a meeting, and apparently the
FCC license still belonged to Broadland until December 2009.

27 ⁵ In March, 2011 Trumbly asked Donaldson “to reconfirm” that he had transferred his KAXT, LLC Membership to
28 Trumbly on January 5, 2010, and Donaldson did. Also they backdated the one page formal document that had been
executed in 2010. That was obviously not appropriate, but it was not substantively incorrect. The fact is as Trustee
he returned the interest to the Trumblys in January, 2010. See text above.

1 2. Respondents also claim that Donaldson never signed the Op. Ag. That is
2 not correct. He signed it twice, once on July 16, 2009 (Ex. 13) and once after the signature line
3 of Rogelio Bolanos was removed (Ex. 10). Respondents also argue that the signatures were
4 forged, but no evidence, or expert, was offered to prove it.

5 Respondents argue further that neither Donaldson nor the Trumblys advised the
6 Kapurs that he held that interest in trust or that Donaldson had returned it to the Trumblys until
7 well into 2012. That contention is disputed, see below, but I believe the Kapurs are honest
8 people and I assume that contention is true. The Trumblys should have made clear that the
9 Donaldson-Trumbly Trust existed.⁶ Indeed, the FCC guide advised that they should have,
10 although Trumbly was not aware of that advice. But in the end this upsetting mistake is not
11 substantive either. Donaldson still in fact was and acted as Trustee; the beneficial interest
12 belonged to the Trumblys, not the Kapurs; the Kapurs retained their 42% interest; and their 42%
13 interest would be the same whether Donaldson or the Trumblys held the interest. Claimants
14 likewise retained their 58% interest. Therefore, either way the 42% - 58% bargain, the core of
15 this transaction, remained intact, as it should.

16 The contentions that Donaldson was never a Member of KAXT and that “no Trust
17 existed” fails. See also C (1) and (D), below.

18 C. The Contentions that Claimants Did Not Provide Their Required
19 Capital Contributions (Counterclaim 2)

20 1. Respondents claim that Donaldson did not contribute his \$250,000 worth
21 of legal services to KAXT, LLC. Respondents mistake what was required here. Claimants were
22 not called to provide new loans or money or services, and none of them did. Rather, they
23 received their interests based on services or loans in consideration for what they had done for the
24 Trumblys in the past. The Trumblys believed they were obligated to pay their family and friends
25 for what they had done for the Trumblys, and that indebtedness was to be cancelled by the Buyer

26 ⁶ The apparent reason for the Trust was Trumbly’s concern that “he had some preexisting problems with a variety of
27 banks in his past real estate investment deals, it was a volatile situation” (Donaldson, Day 1 at 94) and apparently
28 Trumbly did not want the banks to be attracted by the amount of his new investment. Whether this was a sensible
strategy or not has nothing to do with the merits of this dispute, and in any event, no evidence suggests that any bank
cared about it or was affected by it.

1 (KAXT, LLC), “including any obligation that may exist for any of Seller’s owners” (Linda
2 Trumbly owned Broadland, the Seller). (APA, §§ 1.2, 1.3). The result was that Claimants were
3 accorded the interests they were assigned for what they had done in the past, and “regardless of
4 the amounts or terms or conditions set forth in any instruments of indebtedness.” *id.* Nor could
5 that have been a surprise: all the Claimants’ loans, services and equipment indebtedness the
6 Buyer cancelled in accordance with the APA were, in the APA’s words, “provided” -- an act in
7 the past -- and accordingly the APA presented every item the Buyer cancelled in the past tense.
8 Kapur agreed. (Day 3, at 273).

9 Respondents argue that is not fair, for “the undeniable facts” are that the Kapurs put in
10 hundreds of thousands of dollars of their money into KAXT. And “everybody else contributed
11 nothing to KAXT. Nothing.” Respondents mistake the Op. Ag. and the APA’s terms. The
12 Trumblys assigned to KAXT, through Broadland, its Licenses and Assets. That was the basic
13 “consideration” KAXT obtained (APA §§ 1.1, 1.2, 1.3, 1.6; Op. Ag., Ex. B). That was not
14 nothing. Rather, it was the power point of the transaction. As Ravi Kapur put it, “The FCC
15 license is the most valuable asset among all assets, and, if not in the mix, we don’t have a
16 Company.”

17 The result is that the assets and those valuable Licenses assigned by the Trumblys to
18 KAXT gave it life. Trumbly’s loyalty to family and friends he felt indebted to permit them to
19 obtain the interests they were accorded, although he could have kept the interests for himself. As
20 for Donaldson, he held his interest for the benefit of the Trumblys, and properly returned it to
21 them. (See above). The consequence was that the Kapurs were accorded and kept 42% of
22 KAXT and Claimants (including Sutton) 58%, still again exactly what the Parties agreed to, so
23 Respondents lost nothing because of it.

24 These contentions also fail.

25 2. Respondents Contend that the Op. Ag. and the APA Required
26 the Noonans to Make a Cash Capital Contribution

27 Respondents assert that the Op. Ag. required the Noonans to contribute \$150,000 in new
28 loans as their capital contributions to KAXT, LLC. That is incorrect for the same reasons

1 Donaldson had no such requirement. But, Respondents propose, the APA “fails to list any loans
2 by the Noonans” in the APA (Ex. C), so the Noonans had to do what none of the other Claimants
3 had to do. That misreads the Op. Ag. and the APA, for, as the Kapurs agree, both must be read
4 together. Op. Ag. Ex. B refers to the Noonans’ “loans.” APA 1.3 provides that “Buyer shall
5 cancel *all indebtedness of seller, including any obligation for any of Sellers Owners, as listed in*
6 *Ex. C . . .*” (emphasis added). The Trumblys were indebted to the Noonans, including Noonans’
7 loans as listed in Op. Ag. Ex. B. Therefore, Buyer was required to (“Shall”) cancel those debts.
8 Or, to put it a different way, the loans convert to capital contributions in KAXT (Day 3, 278,
9 Kapur). Again, the Op. Ag. and the APA must be read together.

10 Respondents also argue that the Noonans never made a loan to the Trumblys or
11 Broadland, but they did. (Ex. 38).⁷ Their loans, for \$200,000, were to Linda Trumbly, the then
12 owner of Broadland. Jeremy Noonan said the loan was to help the Trumblys with Broadland and
13 affirmed it was not repaid. No evidence (as opposed to speculation) showed that it was.

14 Respondents argue, last, that the indebtedness of the Trumblys to their family and friends
15 was just “moral,” so it is not “consideration” and therefore wasn’t a debt. But (a) a loan is a debt
16 to the borrower, not just moral, (b) the APA still provides that Buyer shall cancel all
17 indebtedness of Seller, “*including any obligation that may exist for any of Seller’s Owners*” as
18 listed in Ex. (C) “regardless of the amounts or terms or conditions set forth in any instruments of
19 indebtedness . . .” (Ex. 12, l. 3). Surely the obligations in issue here, including a loan, satisfy the
20 contract term “*any obligation that may exist for any of Seller’s Owners.*” (emphasis added).

21 These contentions fail.

22 D. Respondents Assert That “Claimants Breached the Operating
23 Agreement by Concealing Brad Donaldson’s Transfer of His
Membership Interests”

24 Respondents find Donaldson’s “Membership” puzzling, perhaps even contradictory, and
25 that is not surprising. He was accorded a Membership, but did not take an interest in KAXT for
26 himself. Rather, he held that interest for the benefit of the Trumblys. He understood it belonged
27 to the Trumblys and “it wasn’t mine.” See Tr., Day 2, pp. 94-95, 101. Accordingly and

28 ⁷ Apparently the Kapurs’ forensic accountant had not looked at her account.

1 properly, as we have seen, he returned that interest to the Trumblys at the end of 2009,⁸ and
2 never received a K-1 from KAXT at any time.

3 Respondents argue further that Claimants concealed that Donaldson departed from
4 KAXT. To begin with, Trumbly said it was common knowledge that Donaldson had departed,
5 but the Kapurs say they did not know about it until well into 2012. This is a he said/he said kind
6 of debate, but I credit the Kapurs' honesty, and believe, as they said, they did not know
7 Donaldson had departed.

8 That, however, doesn't prove that Claimants concealed the facts. To the contrary, as we
9 have seen, every voting list from January 10, 2010 forward showed that the Trumblys had the
10 interest Donaldson had held, Donaldson did not appear on the voting list and had essentially
11 vanished from the scene. (See, e.g., Ex. 26, last page). Likewise, an FCC Ownership Report
12 dated November, 2011, reviewed and approved by Kapur, also showed Donaldson had vanished
13 from the scene (Ex. 19). Further, Nalini Kapur was one of two Managers, and Kapur said he
14 "had the assurance" that she and Trumbly would be running the company with access to all the
15 Company's files (although in fact she was very busy during the Great Recession, and did not
16 review KAXT's financial papers until sometime in 2012). That also does not prove that the
17 Kapurs knew that Donaldson had returned his interest to the Trumblys or had departed. It does
18 show that Claimants did not undertake to hide the facts, and instead left them exposed.⁹

19 Respondents argue further that Donaldson's return of the interest he held in trust for the
20 Trumblys triggered a Notice of Transfer of Membership. That is incorrect. A Notice of Transfer
21 of Membership is a Triggering Event. (See Op. Ag., § 8.3(d)). That Event gives the Company
22 [the ability to] buy the Member's interest, and if it does not, the Members, pro rata in accordance
23 with their prior Membership interests, may buy it. *id.* at § 8.5.

24 That is not this case. Donaldson understood he held his interest in Trust for the
25

26 ⁸ Donaldson was a good friend of the Trumblys, and he had given free time and help to them from time to time over
27 20 years. He also was clear that the Trumblys' sale of the Broadland license and assets was the driver that supported
28 the transaction, so again the interest Donaldson held belonged to them.

⁹ Respondents point out that the KAXT 2009 Report did not mention the facts, but Donaldson had not departed in
2009. They also point out that Donaldson received a FRN in 2010, but by then he was in Texas, and he has no idea
where this FRN is.

1 Trumblys. His duty was to return that interest to the Trustors. He would break that duty and
2 violate his trust should he return that interest to the Company or the Members, for the interest he
3 held belonged to the Trumblys, not him. Tr. Day 1 at 167, 169; Dec., Ex. 128. Nor would it
4 have made any substantive difference to the Kapurs had Donaldson held that interest to the date
5 of sale or even kept it for himself, for, again, the Kapurs' voting and equity percentages would
6 not have changed an iota if he had done so. But he did not do that. He did what he promised to
7 do, again as he should.

8 These contentions fail.

9 E. Respondents Assert that Claimants Defrauded Respondents
10 (Counterclaim 7)

11 Respondents advise that "the heart of this arbitration is the undeniable truth that
12 Claimants defrauded Respondents." Respondents base that contention on this alleged fact:
13 "When the Parties were negotiating, Claimants represented to Respondents that other investors
14 would join them, and therefore the ownership interests acquired by Respondents would be
15 accordingly capped." Respondents add that they "made it clear to the Trumblys that they wanted
16 at least a 50% or better ownership interest in KAXT to adequately protect their investment. As
17 negotiations concluded, the Trumblys misrepresented to Respondents that they could have no
18 more than a 42% interest in KAXT because parts of the Company would go to other investors
19 instead."

20 Those allegations were "the heart" of this arbitration, according to Respondents, but their
21 allegations were incorrect. Thus:

22 1. Claimants did not represent to Respondents that other investors would join
23 them so Respondents' investment had to be capped at 42% and no evidence shows they did.
24 Claimants certainly tried hard to persuade other investors to invest, and so did Ravi Kapur. Both
25 failed. Respondents certainly knew that. Again, as Kapur put it, "nobody was loaning money to
26 small business in particular." As Respondents' brief put it, "Warren Trumbly had failed in
27 attracting investors to KAXT and was therefore dependent upon Respondents' money." Nor did
28 the Kapurs testify that Trumbly or any other Claimant said he or she was contributing new

1 money to KAXT at any time or asked any Claimant to contribute any money owed. Respondents
2 cite transcript passages to prove otherwise, but they do not. See Respondents Brief, p. 48, citing
3 Day 3, Ravi Kapur, Tr. 134-35 (Kapur says Trumbly “was continuing to look at different
4 possibilities for recapitalizing the company.”); *id.* at 136-38 (Trumbly spoke to Kapur about
5 possible investors from Columbia, and flowcharts respecting them, Ex. 257, but none agreed to
6 invest, and the flowcharts were history); Trumbly, Day 3, 133-39 (“contemplating” the Bogota
7 investors, a possibility that never happened). If Trumbly had got \$700,000 from other investors,
8 surely he would have told Kapur he had, and perhaps both would have been high fiving one
9 another. And if Kapur expected Trumbly to provide \$700,000 (notwithstanding no one was
10 lending), it would seem he would have looked for it and would have been angry had Trumbly not
11 have produced it. Neither event happened.

12 2. Respondents did not make clear to the Trumblys that they “wanted at least
13 50% ownership.” Nor did they represent that they could have no more than 42% because other
14 parts of the Company “would go to other investors instead.”

15 (a) Kapur said early on “my *ideal* is to be a full 50-50 partner with you
16 over time,” not now. (Ex. 1; emphasis added). Again, both men thought the “target” was to get
17 \$300,000 from other investors. If such an investor was found, Kapur suggested the investor
18 would get 20% of the company, not 50% and not 42% either. *id.* But no such investors
19 appeared, and instead the Kapurs invested the \$300,000.¹⁰ Since they invested those dollars and
20 no one else did, including the indebted Trumbly, they obtained 42% of the Company.

21 (b) The proposition that the Trumblys represented that Respondents
22 could not have more than 42% because it would go to other investors is based on the same
23 citations in ¶ 1, above were based on. None of those citations proved any such thing. Indeed, if
24 there were another \$700,000 coming in, why would Trumbly have accorded a 42% interest to the
25 Kapurs for \$300,000?

26 In sum, these fraud claims are unproved by clear and convincing evidence or at all.

27 ¹⁰ Respondents’ brief sometimes states that \$430,000, including services, was provided by the Kapurs over the
28 years, but that was not proved. It is clear that \$270,225 was provided in cash (Ex. 9). Kapur advised that tens of
thousands were paid in connection with the KTVU dispute, but how many of those thousands was not addressed.

3. Respondents assert that the “negotiations culminated in the Op. Ag., which obligated the Noonans to contribute \$150,000” and Donaldson to contribute \$250,000 in unpaid legal services. That is a reprise of II (B) and (C) above, and therefore fails. Also, no one could reasonably have believed that Donaldson could contribute \$250,000 in new legal services in the 30 days allotted to Members to contribute capital to KAXT (Op. Ag. 3.2) to begin with.

It is worth noting that as early as October 5, 2009, Trumbly sent three “KAXT Financial Reports” to the Kapurs. (Ex. 40). On the top of the first column of the first and second pages of the first of the three Reports, and in black capitals called “Investment Income,” the Report showed, as you go across the columns, “Investment Income” of \$266,225. That was the amount the Kapurs had invested by then. There were no other investments shown, because there were none.¹¹ No doubt the title “Investment Income” is an odd name, so the Kapurs may not have understood that its dollar investment was the only such investment made by anyone. But Trumbly clearly understood it and, in his way (we all know he is not a gifted accountant) disclosed it. Also, that was not a one-time disclosure. Trumbly sent monthly financial statements to the Members over the years. None of them showed any investment money coming into KAXT besides the Kapurs’ money.

Counterclaim 7 (fraud) fails.

F. Respondents Assert That Claimants' Supposed Fraud and Failure to Perform their Op. Ag. Obligations Entitle Them to a Majority Ownership of KAXT

However:

(1) There was no such fraud, so there is no remedy to look for.

(2) The alleged failure to perform the Op. Ag. obligations is based on the alleged wrongs of the Noonans and Donaldson. Those allegations failed, so again there is also no remedy to look for.

III. PHASE 1 AWARD

Based on the findings and conclusions set forth above:

1. It is declared and confirmed that the Asset Purchase Agreement between OTA,

¹¹ A little later, that number grew to \$270,225. See also fn. 10 at p. 14.

1 LLC and KAXT, LLC was duly authorized and validly executed by KAXT, LLC, and may be
2 consummated in accordance with its terms. Claimants and Sutton are entitled to do so at their
3 earliest convenience, subject to paragraph 2 below.

4 2. Unless both Parties agree otherwise the monies paid by OTA, LLC to KAXT shall
5 be placed and remain in escrow until the Final Award issues, as Claimants suggested at the
6 Prehearing Conference. Assuming both Parties do not agree otherwise, the Parties shall meet
7 and confer at their earliest convenience to agree upon the terms of the escrow, and advise the
8 AAA and the Arbitrator within 5 business days of the date of this Phase 1 Award what those
9 terms are.

10 3. Respondents shall take nothing by their counterclaims 1 and 2, 3 (waived) 4, 6
11 (also waived) and 7, and they are dismissed.

12 4. This Phase 1 Award resolves all issues submitted by the parties in Phase 1, except
13 (a) any disputes or other matters regarding the escrow; (b) the amount of recoverable fees and
14 costs, if any, and (c) the fees and costs of the arbitration and the arbitrator, which will be
15 calculated by the AAA. The fees and costs respecting Phase 1 and Phase 2 shall be calculated
16 and presented when the Phase 2 or Final Award issues.

17 5. The Final Award will incorporate the Phase 1 and 2 Awards and the recoverable
18 fees and costs and the fees and costs of the arbitration and the arbitrator referred to in ¶ 4, above.

19 6. This Award resolves all disputes submitted in Phase 1 of the arbitration, and all
20 claims not expressly granted are denied.

21 7. The Phase 2 issues concern Respondents' Counterclaims 5, 9 and 10. Those
22 claims shall be resolved after the Phase 2 briefs are filed on September 27, 2013.

23 Dated: September 17, 2013

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By: _____
David M. Heilbron, Arbitrator

CERTIFICATE OF SERVICE

I, Anne Thomas Paxson, a member of the law firm Borsari & Paxson, hereby certify that a true copy of the foregoing Supplement to Opposition to Petition to Dismiss, Deny, or, in the Alternative, Hold in Abeyance, was this 25th day of September 2013 sent, via email and via First Class United States mail, postage prepaid, to each of the following:

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